BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2001-209-C - ORDER NO. 2004-100

MARCH 10, 2004

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| IN RE: | Application of BellSouth Telecommunications, Inc. for a Certificate of Public Convenience and Necessity to Provide In-Region InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996. | ) ORDER<br>)<br>)<br>)<br>) |

## I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the six-month review of BellSouth Telecommunications, Inc.'s (BellSouth's or the Company's) 271 performance data, the Tier One penalty regarding the Change Control Process (CCP), the Commission Staff's proposed mediation process, and for reconsideration of the measurement of payment in the Incentive Payment Plan (IPP) itself. Initially, the Commission granted BellSouth's Motion for a paper proceeding in Order No. 2003-235. After the issuance of Order No. 2003-235, BellSouth filed a Proposed Order and Brief, and the Commission Staff filed a Brief with the Commission. On July 1, 2003, the six-month review was placed on the Commission's agenda for disposition. On July 9, 2003, the Commission issued Order No. 2003-449, vacating Order No. 2003-235 and scheduling a hearing. The Commission held in that Order that a hearing should be scheduled to "allow interested parties and the Commissioners an opportunity to present questions to witnesses regarding the calculation of the penalty function of the IPP, more specifically, the difference between the mean and the

confidence level, and the Tier One Penalty regarding the Change Control Process." Although the Commission held that the performance data and the proposed mediation process were not contentious, and would therefore not be addressed at the hearing, both issues would be addressed in a later Order in this matter.

On August 14, 2003, the Commission issued its Order Granting Motion for Clarification, Order No. 2003-502. In that Order, the Commission held that during the hearing, the testimony already filed in the docket would form the basis for the hearing, and no other prefiled testimony would be accepted. Further, the Commission held that any cross-examination would be limited to the two issues to be addressed at the hearing, i.e., the calculation of the penalty function of the IPP, and the Tier One Penalty Change Control Process. An August 21, 2003 hearing date on these issues was set.

The hearing in the matter was indeed held on August 21, 2003. BellSouth Telecommunications, Inc. was represented by Patrick W. Turner, Esquire, and Phil Carver, Esquire. BellSouth presented the testimony of William E. Taylor, Ph.D. and Alphonso J. Varner. John J. Pringle, Jr., Esquire appeared and represented AT&T Communications of the Southern States, Inc., Resort Hospitality Services, Inc., Access Integrated Networks, Inc., NuVox Communications, Inc., and Momentum Business Solutions, Inc. No witnesses were presented by Mr. Pringle on behalf of any of these companies. None of the other original intervenors in this Docket appeared for the hearing. The Commission Staff (the Staff) was represented by Jocelyn G. Boyd, Esquire. The Staff presented the testimony of James M. McDaniel and James E. Spearman, Ph.D.

## II. SUMMARY OF TESTIMONY AND DISCUSSION

### A. PERFORMANCE DATA

Pursuant to Order No. 2002-77, BellSouth was to submit performance data to the Commission on a monthly basis, beginning on January 1, 2002. This Commission also mandated a six-month review of the data. Further, in that Order, this Commission noted that BellSouth's performance measurements allow this Commission and the competitive local exchange carriers (CLECs) to monitor BellSouth's performance and to determine if BellSouth is providing nondiscriminatory service to CLECs in South Carolina.

BellSouth witness Varner and Commission Staff witness Spearman reviewed BellSouth's Monthly State Summaries (MSS). Both witnesses stated that these summaries indicate no backsliding on the part of BellSouth. TR. at 78 and 180.

Mr. Varner compared performance results from the time of the Company's initial filing in South Carolina in April 2001, July through December 2001 and the most recent six months, July through December 2002. Three analyses were performed. The first analysis conducted involved a comparison of the percentage of measures where BellSouth met the performance standard each month, wherein the Company reviewed all sub-metrics that had any activity during the pertinent time period of April 2001 through December 2002. During this period, BellSouth's performance indicated an 85% average. For 2002, Varner noted that BellSouth exceeded the 86% performance level in every month. For the twelve months of 2002, the overall average for BellSouth's performance measures meeting or exceeding the benchmarks or retail analogue comparisons was 90%, according to Varner. TR. at 86.

Varner's second analysis analyzed performance for the six-month period of July 2001 to December 2001, and he compared these results to July 2002 to December 2002 results. Varner stated that BellSouth met or exceeded the benchmarks or retail analogues for a minimum of four of the six months from July 2002 through December 2002 for 90% of the submetrics in South Carolina. During the six month period of July 2001 through December 2001, the Company met or exceeded the benchmark or retail analogues for a minimum of four of the six months for 85% of the sub-metrics in South Carolina. TR. at 88.

The third analysis performed by Mr. Varner compares BellSouth's performance for measures included in the IPP for October 2002 through December 2002 and for the same three month period for 2001. According to Varner, for October through December 2002, BellSouth met 90% of the sub-metrics included in the IPP with CLEC activity. During October through December 2001, BellSouth met 86% of the SQM sub-metrics included in the IPP with CLEC activity. TR. at 90.

Varner's conclusion was that BellSouth's service levels have not diminished since the Company's entrance into the long distance market. Further, Varner's analyses indicate no backsliding on the part of BellSouth. TR. 93-94.

Staff witness Spearman also analyzed BellSouth's MSS from April 2001 to December 2002 to determine if backsliding has occurred. Further, Spearman uses a statistical test to compare BellSouth's pre-271 approval period to the Company's post-271 approval period to determine if BellSouth's performance during the two periods are the same or different. TR. at 181.

For April 2001 through December 2002, Dr. Spearman's analysis shows that BellSouth has improved its performance for all metrics satisfied by improving from 83 percent satisfied in April 2001 to 90 percent satisfied in December 2002. Spearman ultimately reached a conclusion identical to BellSouth witness Varner: that no backsliding occurred. The results of Spearman's analyses indicate that BellSouth's performance during the post-271 period is either greater or equal to its pre-271 performance. TR. at 178-179.

## B. TIER 1 VS. TIER 2 PENALTY FOR CHANGE CONTROL PROCESS

Company witness Varner and Staff witness James McDaniel provided testimony with regard to this matter.

In Order No. 2003-1, we included the issue of whether a Tier One Penalty is appropriate for the metrics associated with the Change Control Process (CCP). In our Order No. 2002-77, we instructed BellSouth to include in the SQM appropriate metrics that measure and assess BellSouth's responsiveness to CLEC-initiated changes submitted to the CCP. In response to the Commission's directive, BellSouth filed six additional metrics associated with the CCP. Thereafter, the total number of metrics associated with CCP activity increased to eleven. A Tier 1 penalty is made to an individual CLEC. A Tier 2 penalty is paid to the State.

Witness Varner states a belief that Tier One metrics penalties are not appropriate for the metrics associated with the CCP. Varner points out that the CCP is a collaborative process which is designed to address CLEC industry concerns; therefore, Tier II Penalties

are the appropriate enforcement mechanism. In addition, Varner notes that the CCP is a secondary process, rather than a primary process. Primary processes such as Ordering, Provisioning, and Maintenance and Repair are primary processes. BellSouth's performance in these areas are therefore subject to Tier 1 enforcement, with payments payable to individual CLEC's, according to Varner's testimony. Varner elaborated by stating that because the CCP is a collaborative process, assessing and paying penalties to individual CLECs would be artificial, arbitrary, and speculative, with no nexus to actual harm done to specific CLECs. Moreover, according to Varner, no other State in BellSouth's region applies a Tier One Penalty to the CCP measure; penalties are assessed on a Tier Two basis only. TR. at 107.

Staff witness McDaniel agrees with BellSouth's position concerning Tier 1 penalties associated with the CCP. Additionally, McDaniel recognizes that the CCP is a collaborative process which allows participation by all local exchange carriers operating throughout BellSouth's nine state region. Because the prioritization of change requests is accomplished through the collaborative process of the CCP, McDaniel is of the opinion that Tier Two penalties are more appropriate for missing CCP measures than Tier 1 penalties, because of the difficulty in assessing penalties to individual CLECs in this process. TR. at 159.

## C. STAFF'S PROPOSED MEDIATION PLAN

Order No. 2002-77 instructed the Staff to develop, in consultation with other parties, a model mediation process to be used in conjunction with the dispute resolution component of the CCP should a dispute be escalated to the Commission. Thereafter, this Commission included the proposed mediation process as an issue to be addressed further in the six-month review. A copy of the proposed process was attached to Staff witness McDaniel's testimony. BellSouth witness Varner supported the Staff proposed process in his testimony.

The Mediation Process as proposed by Mr. McDaniel describes the stages of mediation, procedures when a party requests mediation, the selection of a mediator, and pre-conference processes. Post-mediation issues and fees and costs for the mediator and any meeting rooms are also discussed. In addition, a detailed Standard of Conduct for Mediators is included in the Staff's proposal. TR. at 156-158.

Upon reflection, we do believe that one modification is in order to Section 4.C.2-Selection of a Mediator. ADR Section 13 a & b addresses qualifications for lawyers. We believe that the process related to the selection of a mediator should be modified to indicate that non-lawyers may serve as mediators if they have completed mediation training. Further, we believe that out-of-state mediators may serve in a mediation, provided that the out-of-state mediator can demonstrate to the Commission that they have completed training equivalent to that given mediators in South Carolina. We believe that these modifications allow additional qualified people to serve as mediators in disputes involving the CCP.

## D. MEASUREMENT OF PAYMENT IN IPP PLAN

In Commission Order No. 2002-77, the Commission adopted BellSouth's Incentive Payment Plan. Testimony was presented during the present hearing with regard to whether the payment from the IPP should be calculated from the estimator (mean) as opposed to the edge of the confidence interval.

Bell witness Taylor states a belief that the edge of the confidence interval should be used to both confirm a performance disparity and set the appropriate penalty. TR. at 11. As background information on the IPP, Dr. Taylor's testimony reveals that the IPP ensures that the ILEC provides services to its retail customers in parity with the services that the ILEC provides to a CLEC's customers. TR. at 13. Further, according to Dr. Taylor, the IPP requires the ILEC to pay compensation when the ILEC has provided "lack-of-parity service to its competitors." Id.

Dr. Taylor notes that the IPP uses a truncated z-statistic to determine "lack of parity and to calculate the 'parity gap,' i.e., how far out of parity the ILEC's performance is in supplying wholesale services to CLEC's." TR. at 14. No statistical test is used when benchmarks are applicable. Id. Taylor points out that transactions between the ILEC and individual CLECs may vary widely from the number of transactions between the ILEC and its own retail operations. Therefore, according to Dr. Taylor, each internal ILEC transaction should not be compared to each CLEC transaction, as these figures may be vastly different from month to month. Dr. Taylor states that the only meaningful comparison is between the average quality of service for the two types of transactions. TR. at 15.

Taylor asserted that to ensure that the disparity in service did not arise due to chance and can be attributed to a systemic failure, the observation of non-parity of service must be subjected to a statistical test. Id. Ultimately, Dr. Taylor concludes that any penalty payment should be calculated from the edge of the confidence interval, as opposed to being calculated from the mean. TR. at 28. Staff witness James Spearman agrees with Dr. Taylor's conclusion. TR. at 182. However, a different point of view as to how the payment under the IPP should be measured has been expressed before this Commission in a prior case.

As Dr. Taylor notes in his testimony, Robert M. Bell testified on behalf of AT&T Communications of the Southern States, Inc. in the hearing on Docket No. 2001-209-C on July 9, 2001. TR. at 27-28. Mr. Bell stated a belief that, although it was acceptable to use the detection point or edge of the confidence interval to detect and confirm lack of parity, the penalty for any lack of parity should be based on the parity point, which is the estimator or mean. TR. at 27. Mr. Bell presented an analogy using the way that speeding fines are issued by highway patrolmen to drivers who exceed the speed limit. In the example, the speed limit was set at 65 miles per hour (MPH), and the driver's actual speed was recorded at 77 MPH. Also, the detection point was set at 75 MPH, which was 10 MPH above the actual speed limit. Under this scenario, despite only choosing to stop the speeding driver at a speed above the 10 MPH leeway, the highway patrolman issued a ticket with a fine based on the parity point, which was the "gap" of 12 MPH between the recorded speed of 77 MPH and the speed limit of 65 MPH. Id. Although Dr. Taylor

concludes that this example is inapplicable in the context of statistical testing (TR. at 28), we disagree, and find that the example is logical and workable in the present context.

Specifically, we believe that the present methodology used for measuring the payment under the IPP Plan should be modified to reflect the example given above. That is, for all direct retail analog services provisioned by BellSouth, i.e. not services that are benchmarked, that this Commission, in using and in calculating the payment as a part of the IPP, should calculate those payments based on the difference between the provisioning, either the mean or the absolute value of whatever the CLEC provisioning is, minus parity, as opposed to the edge of the confidence interval. Further, however, no payment would be initiated unless the provisioning of the service for the CLEC was beyond the upper 95% confidence interval. We believe that this methodology is a fairer way of measuring the payment under the IPP Plan than the present methodology, and is consistent and reasonable.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Four matters are before the Commission pursuant to the six-month review of the performance of BellSouth Telecommunications, Inc. under section 271 of the Telecommunications Act of 1996: the performance data itself, the issue of having a Tier 1 versus a Tier 2 penalty for the change control process, the Staff's proposed mediation plan, and the measurement of the penalty in the IPP.

2. A review of the performance data submitted by BellSouth shows that there was no backsliding by BellSouth during the review period. The testimony of BellSouth witness Varner and Commission Staff witness Spearman supports this finding.

3. Tier 2 penalties should be assessed for missing CCP measures, instead of Tier 1 penalties. The testimony of BellSouth witness Varner and Staff witness McDaniel supports this proposition. Clearly, Tier 1 metrics penalties are not appropriate for the metrics associated with the CCP. Witnesses Varner and McDaniel presented testimony that demonstrated that the CCP is a collaborative process which is designed to address CLEC industry concerns. Further the CCP is a secondary process, rather than a primary process. These factors support the use of Tier 2 penalties, rather than Tier 1 penalties, and we therefore find that Tier 2 penalties are the appropriate penalties to assess in connection with the Change Control Process.

4. Staff's proposed mediation plan for use in the dispute resolution component of the Change Control Process is adopted, with the modifications indicated above. The approved mediation plan is attached hereto as Exhibit 1.

5. The payment in the IPP shall be measured as follows: For all direct retail analog services provisioned by BellSouth, i.e. those that would not be benchmarked, the payment would be calculated based on the difference between the provisioning, either the mean or the absolute value of whatever the CLEC provisioning is, minus parity, as opposed to the edge of the confidence interval, and that no payment would be initiated unless the provisioning of the service for the CLEC was beyond the upper 95% confidence interval. This methodology modifies the present measurement of penalties in a manner that is fairer than the present methodology, and is based on the example given by an AT&T witness in a prior proceeding which was quoted by BellSouth witness Taylor.

6. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Mignon L. Clyburn
Chairman

ATTEST:

Bruce F. Duke
Executive Director

(SEAL)

# MEDIATION PROCESS FOR USE WITH DISPUTES UNDER BELLSOUTH'S CHANGE CONTROL PROCESS

## I. INTRODUCTION:

This process is comprised of the following sections:

I. Introduction
II. Mediation Overview
III. Stages of a Mediation
IV. Staff Proposed Mediation Process
V. Standard of Conduct for Mediators

Parts II and III contain background information on mediation and the mediation process. Part IV contains the mediation process to be used in conjunction with the dispute resolution component of BellSouth's Change Control Process ("CCP") as ordered by the Commission in Order No. 2002-77 (dated February 14, 2002), p. 72, 120. Part V contains the "Standard of Conduct for Mediators" adopted by the South Carolina Supreme Court and contained as an appendix to the South Carolina Circuit Court Alternative Dispute Resolution Rules.

## II. MEDIATION OVERVIEW

Mediation is defined by SC Circuit ADR Rule 1(a) as "an informal process in which a third-party mediator facilitates settlement discussions between parties. Any settlement is voluntary. In the absence of settlement, the parties lose none of their rights to trial by judge or jury."

Mediation involves an attempt by the parties to resolve their dispute with the aid of a neutral third party. Mediation is a process whereby a neutral person, the mediator, assists the parties in reaching a mutually acceptable resolution to their dispute. Mediation proceedings are confidential and private.

SC Circuit Court ADR Rule 1(b) defines "mediator" as "a neutral person who acts to encourage and facilitate the resolution of a dispute."

Mediator:

- Neutral third party
- Mediator's role is advisory
- A mediator may offer suggestions but resolution of the dispute rests with the parties themselves

- A mediator does not have authority to make a binding decision (unlike arbitration where the arbitrator renders a decision that is final and binding)
- A mediator should have knowledge of subject matter and experience and training in mediation process.

Advantages of mediation (or other alternative dispute resolution):

- Speed – traditional litigation can entail lengthy delays, high costs, and unwanted publicity. Appeals cause further delay after a decision has been rendered. Mediation (and other alternative dispute resolution processes) is usually faster and less expensive. Mediation can be scheduled at an early stage in the dispute and a settlement can be reached much more quickly than in litigation.
- Informality and Flexibility – Mediation is conducted in a manner that is more businesslike than traditional litigation. Since the parties control the process, they enjoy flexibility. Further, the parties may better understand the mediation process, unlike litigation where complex rules apply, and feel confident that they had the opportunity to present their whole story.
- Privacy – Mediation is not open to public scrutiny like disputes settled in court. Information disclosed at mediation may not be divulged as evidence in any arbitration or judicial or other proceeding.
- Economy – Mediation is designed to be faster, more streamlined, and more informal than litigation. Parties generally save money through reduced legal costs and less staff time.
- Parties are directly engaged in the negotiation of the settlement.
- The mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives which they might not have considered on their own.
- Parties enhance the likelihood of continuing their business relationship, unlike litigation when proceedings can become quite contentious resulting in damaged relationships.
- Creative solutions or accommodations to special needs of the parties can become a part of the settlement.

A mediator does not hold evidentiary hearings as would an arbitrator or court but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and positions of the parties. The separate meetings are known as caucuses. In joint sessions or caucuses with each side, a mediator tries to obtain a candid discussion of the issues and priorities of each party. Gaining certain knowledge or facts from these meetings, a mediator can selectively use the information derived from each side to

- reduce the hostility between the parties and help them engage in a meaningful dialogue on the issues at hand;
- open discussions into areas not previously considered or inadequately developed;

- communicate positions or proposals in understandable or more palatable terms;
- probe and uncover additional facts and the real interests of the parties;
- help each party to better understand the other parties' views and evaluations of a particular issue, without violating confidences;
- narrow the issues and each party's positions and deflate extreme demands;
- gauge the receptiveness for a proposal or suggestion;
- explore alternatives and search for solutions;
- identify what is important and what is expendable;
- prevent regression or raising of surprise issues; and
- structure a settlement to resolve current problems and future parties' needs.

## III. STAGES OF A MEDIATION:

### A. The Agreement to Mediate:

1. As mediation is a voluntary process, the parties must agree in writing that their dispute will be conducted under the applicable mediation process.
   - The parties can provide for the resolution of future disputes by including a mediation clause in their contract.
   - Where parties did not provide in advance for mediation, they may submit an existing dispute to mediation by the filing of a submission form that has been duly executed by the parties or their authorized representatives.
   - Any party may request to invite other parties to join in a submission to mediation. This request may be allowed by letter or telephone call. Upon receipt of the names, telephone numbers, and addresses of the parties to be contacted and a brief description of the dispute, the other parties should be written in order to explain the mediation process. Further, communication via mail or telephone with the other parties may be utilized to further explain the mediation process and answer questions.

2. The document initiating mediation, whether in the form of a Request for Mediation or a Submission, is filed with the Commission and should include a brief description of the nature of the dispute.

3. Upon receipt of a properly filed request , the Commission appoints a qualified mediator to serve on the case. The parties will have an opportunity to file any objections to the appointed mediator. Because it is essential that the parties have complete confidence in the mediator's ability to be fair and impartial, the Commission should replace a mediator not acceptable to the parties.

4. Following appointment to a case, the mediator will then make the necessary arrangements for the scheduling of meetings between the mediator and the parties.

B. The Mediation Conference:

1. Parties are entitled to representation by counsel.

2. Parties should come to the mediation conference prepared with all of the evidence and documentation they feel will be necessary to discuss their respective cases.

3. At the outset, mediator should describe the procedures and ground rules and should cover each party's opportunity to talk, order of presentation, decorum, discussion of unresolved issues, use of caucuses, and confidentiality of the proceedings.

4. After the preliminaries, each party describes its respective views of the dispute. The initiating party discusses its understanding of the issues, the facts surrounding the dispute, what it wants, and why. The other party then responds and makes similar presentations to the mediator. In this initial session, the mediator gathers as many facts as possible and clarifies discrepancies. The mediator tries to gain an understanding of the perception of each party, their interests, and their positions on the issues.

5. When joint discussions have reached a stage where no further progress is being made, the mediator may meet with each party in caucuses. While holding separate sessions with each party, the mediator may shuttle back and forth between parties and bring them back to joint sessions at appropriate intervals. During each caucus, the mediator attempts to clarify each party's version of the facts, priorities, and positions, as well as attempts to loosen rigid stances, explore alternative solutions, and seek possible tradeoffs. The mediator probes, tests, and challenges the validity of each party's positions. The mediator serves not as an advocate but as an "agent of reality." The mediator must make each party think through its demands, priorities, and views, and deal with the other party's arguments.

6. An effective mediator knows that demands and priorities shift as ideas meet opposition, different facts are considered, and underlying circumstances change as parties reappraise and modify positions. In effect, the mediator increases the parties' perceptions of their cases in order to construct a settlement range within which the parties can assess the consequences of continuing or resolving the dispute. By having parties focus on the risks and burdens of litigation, the mediator

creates the idea that there are alternatives to seek. The parties articulate these possibilities by moving toward tradeoffs and acceptable accommodations.

7. During the caucuses and joint sessions, the mediator narrows the differences between the parties and obtains agreement on major and minor issues. The mediator reduces a disagreement into a workable solution. At appropriate times, the mediator makes suggestions about a final settlement, stresses the consequences of failure to reach an agreement, emphasizes the progress which has been made, and formalizes offers to gain an agreement.

8. The mediator acts as facilitator to keep discussions focused and avoid new outbreaks of disagreement. The mediator will often have the parties negotiate the final terms of a settlement in a joint session. The mediator will then verify the specifics of an agreement and make sure that the terms are comprehensive, specific, and clear in the final session.

C. The Settlement:

1. When the parties reach an agreement, they should reduce the terms to writing and exchange releases.

2. If the mediation fails to reach a settlement of any or all of the issues, the parties may submit to binding arbitration. Generally, unless agreed to otherwise by the parties, such arbitration would be administered under the appropriate arbitration rules, and, in accordance with the rules, the information offered in mediation may not be used in arbitration (or in subsequent litigation).

## IV. STAFF PROPOSED MEDIATION PROCESS:

A. Request for Mediation

1. The party requesting mediation must submit a written request for mediation. The written request must contain
   a. a short description of the issue(s) to be decided,
   b. the positions of the parties,
   c. the relief sought,
   d. the name address, telephone number, and facsimile number of the party to the negotiation making the request,
   e. the name, address, telephone, number, and facsimile number of the other party (ies) to the negotiation, and

f. the name, address, telephone number, and facsimile number of the parties' representatives who are participating in the negotiations and to whom inquiries should be made.

2. The requesting party(ies) may submit two (2) names of individuals qualified to serve as mediators, and the name, address, place of employment, position held, and brief statement as to why each individual is qualified to serve as a mediator.

3. The requesting party(ies) must also file, contemporaneous with the filing of the request for mediation, a Certificate of Service evidencing service of the mediation request with the Commission and service upon the other parties.

4. The requesting party(ies) must file with the Commission an original and fifteen (15) copies of its request for mediation.

5. Under Section 8.0 "Escalation Process" of BellSouth's CCP (Version 3.2 dated July 29. 2002), the subsection titled "Dispute Resolution Process" provides for "mediation through the appropriate state regulatory agency, if available." (CCP, Version 3.2 dated July 29, 2002, p. 71). Further, BellSouth's CCP provides "without necessity for prior mediation, either BellSouth or any CLEC affected by the dispute may file a formal complaint with the appropriate state regulatory agency, requesting resolution of the issue." *Id.* If a party files a formal complaint without having requested mediation, the Commission may recommend mediation prior to hearing the formal complaint filed by BellSouth or any CLEC affected by the dispute.

B. Non-Requesting Party to Submit Names of Suggested Mediators

The non-requesting party(ies) may submit two (2) names of individuals qualified to serve as mediators within three (3) business days of receiving a copy of the request to mediate.

C. Selection of a Mediator

1. The Commission will select the mediator in the mediation process. The Commission may select an individual to serve as mediator other than the individuals submitted by the parties. (Note: The mediator must be impartial and should have training in mediation processes as well as knowledge of the subject matter.)
2. The mediator, or neutral, may be a person who:
   (a) is a certified neutral under Circuit Court ADR Rule 13; or
   (b) is not a certified neutral but in the opinion of all of the parties is otherwise qualified by training or experience to mediate all or some of the issues in the action; or

(c) is a non-lawyer with the same mediation training as described in Circuit Court ADR Rule 13; or

(d) is from outside the State of South Carolina, but who can demonstrate to the Commission that he or she has had training in mediation that is equivalent to that described in Circuit Court ADR Rule 13.

3. Parties must be afforded the opportunity to reject the mediator selected, until parties can agree on the selection. Parties must file with the Commission a notice of rejection of mediator and serve the notice of rejection of mediator on the other party(ies) to the mediation within three (3) business days of notification of the Commission's selection of a mediator. (Note: The parties must have complete confidence in the mediator; therefore, the parties should be afforded the opportunity to reject a mediator.)
4. If a party or parties reject the selected mediator, the Commission should propose another mediator until a mediator is selected who meets with the parties' approval.
5. In the selection of a mediator, the Commission will consider the recommendations of the parties. Further, the Commission may seek a mediator from a roster of neutrals certified under SC Circuit Court ADR Rule 13. A roster of neutrals may be obtained from the court of Lexington or Richland County or from the South Carolina Supreme Court.
6. The Commission may select as the mediator a member of the Commission or the Commission Staff or a person listed as a neutral on the court rolls or a person suggested by and agreed upon by the parties.
7. Should the mediator be a Commissioner, Commission Staff member or other qualified person as set forth in Item 2 above, the mediator is disqualified as a witness, consultant, or expert for either party in any matter relating to the disputes covered by the mediation process or from participating as a trier of fact in any matter relating to the disputes covered by the mediation process.

D. Mediation Proceedings Shall be Closed

Interventions by other entities, not parties to the mediation, will not be permitted during the mediation process. The mediation process will be closed to the public.

E. Pre-conference Processes

1. Within 10 calendar days following selection of a mediator, each party shall submit the following documents to the mediator, with service on the other parties:

a. A position paper summarizing the arguments of the party. This paper shall not exceed 20 pages, excluding charts and tables.
b. All documents relevant to the dispute. The parties shall cooperate with each other in selecting documents to avoid duplication between the submissions of each party.
c. A list of the issues to be determined by the mediator. The parties will make every effort to submit a joint list of issues in the order that is most logical for presentation of the dispute.
d. A list of witnesses and participants in the mediation proceeding. Each party must include as participants to the mediation (1) a spokesman, (2) a person who has authority to commit to settlement on behalf of the party, and (3) a person familiar with and accustomed to mediation conferences. These individuals should be identified on the list of participants.

2. The mediator may request any mediating party to provide clarification and additional information necessary to assist the resolution of the dispute.

3. The mediator shall arrange with the parties for the mediation proceeding to be held as expeditiously as possible, following receipt of the information listed in subpart (1) above, and shall arrange for a suitable location for the mediation to take place. The mediator shall also schedule the time allotted for the mediation conference, ensuring sufficient time for the negotiation process without placing undue burden of time constraints upon the parties.

4. The mediator, in his/her discretion, may require a pre-conference meeting with the parties. At the pre-conference meeting, the mediator should discuss with the parties the procedural schedule for the proceeding. The mediator and the parties should also attempt to identify, simplify, and limit the issues to be resolved. Each party should be fully prepared to present its case informally to the mediator at the pre-conference meeting.

F. The mediation conference shall be conducted using the following procedures:

1. Each party will make an opening statement of no longer than ½ hour, unless additional time is requested and granted by the mediator prior to the mediation conference. The first statement will be made by the party initiating the mediation.

2. Each issue will be discussed using a round table discussion technique. Each party will make its key employees and consultants available to participate in this discussion. In the discussion, the party initiating the

mediation will make a brief presentation of its position on the issue. The other party will then make a brief presentation of its defense. The mediator will then moderate a discussion – calling on participants from each side as they request to address the issues in question. There will be no side discussions at this juncture, and no participant will speak until called on by the mediator. The goal of this discussion is to fully develop all information relevant to the determination of the facts of the dispute and the precise position of each party. All participants will refrain from statements that are unduly argumentative or contentious.

3. The proceedings will not be recorded, and witnesses will not be sworn. Formal rules of evidence are inapplicable to the mediation process. However, all participants will be expected to be forthright in their statements and to be fully open and honest in their dealings with each other and with the mediator. Good faith dealing during the mediation process is required.

4. Attorneys may participate in the discussion and may call on other personnel when necessary to ensure that they contribute their knowledge to the discussion. Attorneys will not cross-examine witnesses of the other party.

5. Following the round table discussions, each party may summarize its position in a statement no longer than ½ hour. The parties may, by mutual agreement, waive these statements.

6. Following the above-listed proceedings, the mediator will meet to facilitate negotiations of a settlement that is fair to the parties. The parties may request a private, confidential meeting with the mediator (caucus) to discuss possible settlement positions, and the mediator will not reveal any confidential information to the other party, unless authorized to do so. Either party may adjourn the meeting at any time to caucus with his team, but all parties will endeavor to keep the negotiations active until a settlement has been reached. If settlement has not been reached within the time allotted for this proceeding, the parties may request to continue negotiations for any period that it is deemed desirable.

7. In the event that the mediating parties fail to reach resolution of their differences, the mediator, before terminating the mediation proceeding, shall submit to the parties a final proposed resolution. If a party does not accept the mediator's proposed resolution, the party shall advise the mediator of the specific reasons for its refusal within five (5) calendar days of the mediator's issuance of the proposed resolution.

G. POST MEDIATION PROCEEDING:

1. If settlement is reached, either party may request the mediator to prepare a report documenting the settlement and stating his/her conclusion as to its merits. Any such report will be delivered to each party promptly after it is requested. This report may be used by either party to justify the settlement within its own organization.

2. This entire process is a settlement negotiation and all offers, promises, conduct, or statements made in this mediation proceeding are confidential, unless the parties agree otherwise, and shall be inadmissible in any subsequent litigation (including proceedings before the Commission) of the disputes covered by the mediation. All written materials created specifically for the covered mediation are also confidential, unless the parties agree otherwise, and inadmissible in subsequent litigation. However, if settlement is reached, any such statements and written materials may be used to justify and document the contract modification embodying the settlement. Additionally, the parties may make their own rules with respect to confidentiality of the mediation proceedings; however, under no circumstances may details of the mediation process be used in any subsequent litigation or proceedings before the Commission.

3. The mediator will treat the subject matter of the mediation as confidential, to the extent agreed upon by the parties, and refrain from disclosing any of the information exchanged to third parties. The mediator is disqualified as a witness, consultant, or expert for either party in any matter relating to the disputes covered by the mediation process or from participating as a trier of fact in any matter relating to the disputes covered by the mediation process.

4. Any settlement reached through this mediation process need not be approved by the Commission. However, the Commission must be notified that a settlement was reached so that any docket created may be closed.

H. FEES AND COSTS

Any fees of the mediator and the cost of meeting rooms will be shared equally by the parties. With regard to any other costs associated with the mediation proceeding, each party will bear its own costs.

V. STANDARD OF CONDUCT FOR MEDIATORS:

**Standard of Conduct for Mediators**[1]

**Standard I. Self-Determination: A mediator shall recognize that mediation is based on the principle of self-determination by the parties.**

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

Comments

The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.

A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

**Standard II. Impartiality: A mediator shall conduct the mediation in an impartial manner.**

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

Comments

A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.

A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

**Standard III. Conflicts of Interest: A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation.**

[1] As contained in Appendix B, SC Circuit Court ADR Rules.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

Comments

A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

**Standard IV. Competence: A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties.**

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

Comments

Mediators should have available for the parties information regarding their relevant training, education and experience.

The requirements for appearing on a list of mediators must be made public and available to interested persons. When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

**Standard V. Confidentiality: A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.**

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

Comments

The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.

If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.

Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.

Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

**Standard VI. Quality of the Process: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.**

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

Comments

A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should

not allow a mediation to be unduly delayed by the parties or their representatives.

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs significantly from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice.

Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.

A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

**Standard VII. Advertising and Solicitation: A mediator shall be truthful in advertising and solicitation for mediation.**

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

Comments

It is imperative that communication with the public educate and instill confidence in the process.

In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

**Standard VIII. Fees: A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties.**

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

Comments

A mediator who withdraws from a mediation should return any unearned fee to the parties.

A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.

A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

**Standard IX. Obligations to the Mediation Process**

Mediators have a duty to improve the practice of mediation.

Comment

Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.